94-107

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana	))))))	**PR File No. 94-SP5**

COMMENTS OF
MERCURY CELLULAR TELEPHONE COMPANY AND MOBILETEL, INC.

Mercury Cellular Telephone Company and MobileTel, Inc. ("the Carriers") hereby oppose certain portions of the August 9, 1994 petition of the Louisiana Public Service Commission ("LPSC") seeking grandfathered authority under Section 332(c)(3)(B) of the Communications Act ("the Act") to continue regulating the "rates charged" and "services rendered" by commercial mobile radio services ("CMRS"). Specifically, the Carriers object to: (a) the LPSC's vague request to continue regulating the "services rendered" by CMRS providers, to the extent that it constitutes preempted entry regulation; (b) the LPSC's unsupported request to continue regulating the rates charged by paging companies and other non-cellular CMRS providers; and (c) the LPSC's request to impose new and more stringent regulations (including a potential rate of return system) upon the rates of cellular providers.

Any LPSC Regulation Of Services Rendered Should Not Be Permitted To Delay Or Preclude CMRS Providers From Entering Louisiana Markets

Section 332(c)(3)(A) of the Act expressly preempts state and local governments from regulating the "entry of or the

rates charged by any commercial mobile service [emphasis added]," while Section 332(c)(3)(B) gives certain states a limited right to petition for grandfathered regulation of certain commercial mobile service rates. A fair reading of these provisions is that Congress has fully and permanently preempted state and local regulation of the entry of CMRS providers into geographical and other service markets, and that it has established no grandfathering mechanism that would permit state or local governments to continue to regulate CMRS market entry. See H.R. Rep. 103-213, 103rd Congress, 1st Session, at 493-94 (Conference Report).

The LPSC does not specify how it proposes to continue regulating "services rendered" by CMRS providers. Its only reference to "services rendered" is its description of its registration requirements for CMRS providers furnishing cellular or paging services in Louisiana (Petition, pp. 7-9). In addition to basic identification information, these registration requirements include: (a) the filing of a "rate tariff" setting forth charges and types of service; (b) a showing of "technical capability" to support the offered services; and (c) "verification" that the registering entity will comply with LPSC guidelines and requirements, including the making by paging companies of a demonstration of public convenience and necessity (Id., pp. 7-8 and n. 3). Similar provisions are also included in the LPSC's "proposed and/or existing rules" (Petition, pp 48-49).

The Carriers accept the current LPSC's representation that it does not intend to use registration requirements "to exclude CMRS providers or to limit the market" (Id., p. 8). In addition, they have no objection to the LPSC's collection of name, address and other basic background information on CMRS providers doing business in Louisiana. However, the "rate tariff filing," "technical capability" and "verification" aspects of the existing registration requirements and the "proposed and/or existing rules" are readily capable of being employed by a future, changed LPSC or by the Louisiana courts to delay or preclude entry into CMRS markets. For example, in the recent past, Revised Statute 45:1503(C) has been used by the Louisiana courts to prevent the LPSC from granting certificates of public convenience and necessity[1] to radio common carriers for services that would compete with or duplicate the services of another radio common carrier unless: (a) the new entrant could prove that the existing service was inadequate; and (b) the existing carrier was unable to or refused to provide adequate service. See, e.g., Southern Message Service, Inc. v. Louisiana Public Service Commission, 520 So.2d 734 (1988), and Radiofone, Inc. v. Louisiana Public Service Commission, 573 So.2d 460 (1991) (copies attached).

Therefore, the Carriers ask the Commission to deny the

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[1] Revised Statute 45:1503(A) precludes a radio common carrier from beginning, continuing or extending service in Louisiana without first obtaining a certificate of public convenience and necessity from the LPSC.

LPSC's request to continue regulating CMRS "services rendered," and to declare that the "rate tariff filing," "technical capability," and "verification" aspects of the LPSC's existing registration requirements and "proposed and/or existing rules" may not be employed, directly or indirectly, to hinder, delay or preclude CMRS market entry.

The LPSC Has Not Demonstrated Any Need To Continue Regulating The Rates Of Paging And Other Non-Cellular CMRS Providers

Section 332(c)(3)(A)(i) of the Act requires states seeking to regulate the rates for any commercial mobile service to demonstrate that "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." Section 20.13(a)(2) of the Commission's Rules contains "a non-exhaustive list of examples" of the evidence regarding market conditions and consumer protection that will be considered by the Commission.

Whereas the LPSC appears to be seeking authority to continue regulating the rates charged for all CMRS services, it has presented no Section 20.13(a)(2) evidence with respect to paging and other non-cellular CMRS providers. Rather, the customer complaint (Petition, pp. 9-15), discriminatory rate (Id., pp. 15-17), overcharge (Id., pp. 18-19), special disabled person rate (Id., p. 19), duopoly market structure (Id., pp. 27-29), lack of substitute services (Id., pp. 29-30) and entry barrier (Id., p. 30) showings in the LPSC's

petition pertain solely and entirely to cellular service.

The Commission has recognized that the paging industry is highly competitive, and that other non-cellular CMRS services are competitive. Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd 1411, 1468 (1994). The only reference in the LPSC's petition to non-cellular CMRS services is a list of 24 radio common carriers currently operating in Louisiana, plus a notation that many local exchange carriers also provide radio common carrier services (Id., pp. 25-27 and n. 5). This evidence shows that Louisiana contains competitive non-cellular CMRS markets where consumers can protect themselves from unjust or discriminatory rates by switching providers.

In sum, the LPSC has furnished no evidence whatsoever that non-cellular CMRS markets in Louisiana are not fully competitive, or that Louisiana subscribers are subjected to unjust, unreasonable or discriminatory rates for non-cellular CMRS services. Therefore, the Commission should deny the LPSC authority to continue regulating the rates charged for paging and other non-cellular CMRS services.

The LPSC Has Not Demonstrated Any Need To Impose New And More Stringent Rate Regulation Upon Cellular Carriers

The Carriers agree that the LPSC has resolved a broad range of consumer complaints regarding cellular service (Petition, pp. 10-15). The LPSC can continue these activities via regulation of "other terms and conditions" of service,

which include "customer billing information and practices and billing disputes and other customer protection matters." H.R. Report 103-111, 103rd Congress, 1st Session, at 261.

However, the LPSC has not made a sufficient showing under Section 20.13(a) of the Rules to grandfather its regulation of cellular rates. It has submitted no evidence regarding: (a) the numbers of Louisiana cellular customers and customer base trends (§20.13(a)(2)(ii)); (b) rate information for Louisiana cellular carriers and markets (§20.13(a)(2)(iii)); (c) specific allegations (supported by affidavits) of significant and/or widespread anti-competitive or discriminatory behavior by Louisiana cellular carriers (§20.13(a)(2)(vi)); or (d) particular instances of systematic unjust, unreasonable or discriminatory rates other than allegedly excessive roamer rates charged by a single former cellular carrier (§20.13(a)(2)(vii)).

Put simply, the LPSC has submitted only anecdotal evidence of a few isolated, past consumer complaints regarding cellular rates and bills -- many of which complaints it could continue to handle under its authority to regulate "other terms and conditions" of service. It has presented no evidence that current Louisiana cellular markets are characterized by the widespread or significant unjust, unreasonable, or discriminatory rates that must exist to justify continued LPSC regulation of cellular rates.

In addition, the LPSC has demonstrated no basis for

imposition of a new and more stringent "rate base/rate of return" regulatory system upon cellular carriers (Petition, p. 28). First, the intent of Congress in adopting Section 332(c)(3)(B) of the Act was to permit states to grandfather their CMRS rate regulations in effect on June 1, 1993 if they could make the requisite showing that grandfathering was needed for a limited time to protect consumers. Conference Report at 493-94. There is no indication in Section 332(c)(3)(B) or its legislative history that the Congress intended to allow states to impose new and/or more stringent rate regulations upon CMRS providers.

Second, rate of return regulation was designed for the regulation of monopoly services, and can only disrupt, distort, delay or destroy the ability of cellular carriers to function in a duopoly or emerging competitive industry. In its AT&T Price Cap Order, 4 FCC Rcd 2873, 2908 (1989), this Commission found that "[r]ate of return regulation is a methodology designed to address the problem of constraining market power exercised by monopoly utilities." It determined that rate of return regulation had the following weaknesses: encouragement of inefficient investment decisions, incurrence of unnecessary operating expenses, reduced incentives for innovation, increased incentives for cross-subsidization of competitive services, cost allocation problems, regulatory lags, and excessive administrative burdens and expenses for both regulated carriers and regulatory commissions. Id. at

2907-13. See also LEC Price Cap Order, 5 FCC Rcd 6786, 6789-92 (1990).

In existing two-carrier cellular markets, the regulatory lags and administrative burdens of rate of return regulation would significantly impair consumer benefits and the growth of competition. If Cellular Carrier A in Market X wanted to introduce a new service or decrease its existing rates, its competing Cellular Carrier B could delay the change by insisting upon a full LPSC investigation of the underlying cost basis for Cellular Carrier A's proposal. Likewise, if Cellular Carrier A gained a competitive advantage over Cellular Carrier B, it could prolong this advantage by requiring an LPSC investigation of the underlying cost basis for Cellular carrier B's response.

The delays and disadvantages of rate of return regulation will intensify as the broadband Personal Communication Service ("PCS") and wide-area Specialized Mobile Radio Service ("SMR") industries increase the competition faced by cellular providers[2]. The Commission will auction six broadband PCS

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[2] The Commission has recognized that the present structure of the cellular industry -- with two facilities-based carriers per market, plus resellers -- is sufficiently competitive to allow limited bundling of cellular service and customer equipment, but that the record is not conclusive as to whether the cellular service market is fully competitive. Bundling of Cellular Premises Equipment and Cellular Service, 7 FCC Rcd 4028, 4029 (1992). It has also recently determined that this same state of competition does not preclude its exercise of various aspects of its forbearance authority under new Section 332 of the Communications Act. Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd 1411, 1467-68 (1994).

licenses per market during the next year; and has adopted rules to ensure that existing cellular licensees will face from 3-to-6 new PCS competitors per market (§24.229), and that competition will quickly emerge from the new PCS competitors (§24.203). A recent Personal Communications Industry Association survey projects that broadband PCS will have 8.55 million U.S. subscribers (3.1% penetration) by 1998, and 31.11 million subscribers (10.4% penetration) by 2003. Telecommunications Reports, January 31, 1994, pp. 11-12. The Commission also has acted to enhance the ability of SMR providers to compete with cellular and PCS. Specifically, it has permitted 900 MHz SMR facilities to be licensed on a wide-area basis, and has proposed that 800 MHz SMR systems also be licensed on a wide-area basis. News Release "Regulatory Framework For CMRS Completed," Report No. DC-2638, released August 9, 1994. Large SMR licensees such as Nextel, Inc.[3] have already begun implementing new, cellular-like services via waivers. Fleet Call, Inc., 6 FCC Rcd 1533 (1991).

If Louisiana cellular carriers are saddled with "rate base/rate of return" regulation while competing PCS and SMR providers are not, the cellular carriers will be like turtles

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[3] Notwithstanding the failure of its merger with MCI, Nextel is currently converting its SMR frequencies into a digital-cellular network of 4,000 cells that will serve up to 1.5 million customers. The Wall Street Journal, p. 1, August 31, 1994.

trying to catch jackrabbits. The result will be the antithesis of the "regulatory parity" that Congress intended Section 332(c)(1) to establish. Conference Report at 490.

Therefore, the Commission should deny the LPSC authority to continue regulating cellular rates and, in particular, to impose rate of return regulation or any other new and more stringent form of rate regulation upon cellular carriers.

Conclusion

The Carriers ask the Commission to deny the LPSC authority: (a) to regulate "services rendered" and other aspects of market entry by CMRS providers; (b) to regulate the rates charged by paging companies and other non-cellular CMRS providers; and (c) to regulate the rates of cellular providers (particularly via a rate of return system).

Respectfully submitted,

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Dated: September 19, 1994

not pledge stock they did not own, and the promissory note filled in by Meyers is unenforceable against the Forrests because it was completed without authority or consideration.

DECREE

For the foregoing reasons, the judgments of the trial court and the court of appeal are reversed, and plaintiff's suit is dismissed, plaintiff to pay all costs.

REVERSED.

SOUTHERN MESSAGE SERVICE, INC.

v.

LOUISIANA PUBLIC SERVICE COMMISSION.

No. 87-CA-2314.

Supreme Court of Louisiana.

Feb. 29, 1988.

Radio common carrier which was already servicing area sought judicial review of decision of Public Service Commission granting certificate of public convenience and necessity to competitor. The 19th Judicial District Court, Parish of East Baton Rouge, Doug Moreau, J., found evidence insufficient to support Commission's order and reversed, and appeal was taken. The Supreme Court, Cole, J., held that unprofessional and unscientific study of adequacy of existing service, together with dated and biased testimony of applicant's witnesses, was not sufficient to establish applicant's entitlement to certificate of public convenience and necessity to operate radio paging service.

Judgment of District Court affirmed.

1. Telecommunications ⇐461.10

Applicant for certificate of public convenience and necessity to operate radio paging service had burden of clearly showing that public convenience and necessity would materially be promoted by issuance of certificate. LSA-R.S. 45:1503, subds. A, C.

2. Telecommunications ⇐461.10

Public Service Commission's determination not to issue certificate of public convenience and necessity to operate radio paging service would not be reversed on appeal, unless determination was based on error of law or was one that Commission could not have reasonably made from evidence.

3. Telecommunications ⇐461.10

Unprofessional and unscientific study of adequacy of existing service, together with dated and biased testimony of applicant's witnesses, was not sufficient to establish applicant's entitlement to certificate of public convenience and necessity to operate radio paging service. LSA-R.S. 45:1503, subds. A, C.

Desmond E. McGinn, Shreveport, for intervenor-appellant.

Carlos Spaht, Kantrow, Spaht, Weaver & Blitzer, Marshall Brinkley, Baton Rouge, for defendant-appellee.

COLE, Justice.

This appeal is from a judgment of the Nineteenth Judicial District Court reversing an order of the Louisiana Public Service Commission (Commission) granting a certificate of public convenience and necessity. The only issue presented is whether the applicant sustained his required burden of proof under La.R.S. 45:1503(C). The district court held the applicant did not satisfy the statutory burden. We affirm.

PROCEDURAL HISTORY

In February of 1986, Danny J. Lawler d/b/a Danny J. Lawler and Associates (Lawler) filed an application with the Commission for a certificate as a radio common

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carrier to operate a paging service for the Shreveport area. Southern Message Service, Inc. (SMSI), a radio common carrier which has held a certificate since 1968 to service the same area, opposed the application.

On September 23, 1986, a public hearing was held on the matter before Hearing Officer Edward L. Gallegos, Chief Engineer of the Commission. In his report to the Commission he stated:

> It is the opinion of the Examiner that sufficient paging service is available in the Shreveport area and that the future plans of the existing carriers will cover any future needs of the public.

Nevertheless, the Commission ordered the application approved stating:

> It is the opinion of the Commission that additional service is necessary in the Shreveport area that will cover the entire parish of Caddo and that it is [in] the public interest to authorize additional paying service in the area.

After the Commission denied its application for rehearing SMSI appealed the Commission's order to the district court and Lawler intervened. The district court found the evidence insufficient to support the Commission's order and reversed, nullifying the certificate. The Commission chose not to appeal this decision. However, Lawler appealed directly to this court in accordance with Article IV, § 21(E) of the Louisiana Constitution.

LAW

The law governing the issuance of these certificates and judicial review thereof is well settled. No carrier may begin construction or operation of a mobile radio system without first obtaining a certificate from the Commission that the present or future public convenience and necessity requires such construction or operation. La. R.S. 45:1503(A). If the proposed operation of a carrier will compete with or duplicate the service of another carrier, the Commission is prohibited from granting the requested certificate unless it first determines both "that the existing service is inadequate to meet the reasonable needs of the public *and* that the person operating the same is unable to or refuses or neglects after hearing on reasonable notice to provide reasonable adequate service." (Emphasis added). La.R.S. 45:1503(C). *Southern Message Service, Inc. v. Louisiana Public Service Commission*, 370 So.2d 874 (La.1979); *Communications Ind., Inc. v. Louisiana Public Service Commission*, 260 La. 1, 254 So.2d 613 (1971).

[1, 2] An applicant for a new certificate has the burden of showing clearly the public convenience and necessity is materially promoted by the issuance of the certificate. *Miller Transporters, Inc. v. Louisiana Public Service Commission*, 518 So.2d 1018, 1020 (La.1988). *M & G Fleet Service, Inc. v. Louisiana Public Service Commission*, 443 So.2d 574, 575 (La.1983); *Florane v. Louisiana Public Service Commission*, 433 So.2d 120, 123 (La.1983); *Dreher Contracting & Equipment Rental, Inc. v. Louisiana Public Service Commission*, 396 So.2d 1265, 1266–67 (La.1981); *Truck Service, Inc. v. Louisiana Public Service Commission*, 263 La. 588, 268 So.2d 666, 667–68 (1972); *Hearin Tank Lines, Inc. v. Louisiana Public Service Commission*, 247 La. 826, 174 So.2d 644, 647 (1965). Upon judicial review of the Commission's determination of whether the applicant has made such a showing, a court will not upset the agency's finding unless it is based on an error of law or is one which the Commission could not have found reasonably from the evidence. *Miller Transporters, Inc. v. Louisiana Public Service Commission*, supra; *M & G Fleet Service, Inc. v. Louisiana Public Service Commission*, supra; *Florane v. Louisiana Public Service Commission*, supra; *Dreher Contracting & Equipment Rental, Inc. v. Louisiana Public Service Commission*, supra; *Truck Service, Inc. v. Louisiana Public Service Commission*, supra; *Hearin Tank Lines, Inc. v. Louisiana Public Service Commission*, supra.

In its reasons for judgment the district court found the applicant failed to present adequate evidence to carry his burden with respect to either requirement of section 1503(C). As regards the first requirement

the district court found the evidence to be insufficient. As to the second, it stated no evidence whatsoever had been presented.

[3] We agree with the determinations of the district court. As will be shown by the summary of the evidence below, the Commission could not have reasonably found the present carriers inadequate to meet the present or future needs of the public within the requirements of section 1503(C).

THE APPLICANT'S CASE

In support of his claim the service of the existing carriers was deficient, Lawler called several witnesses. The first was his father, Joe Lawler. He testified he had used SMSI's two-way radio telephone service in his construction business. He complained that not enough channels were available in the morning hours. After this difficulty he discontinued the service. He admitted these difficulties occurred over three years before his son's application and that he did not complain to SMSI about the problems. He also never rented pagers from SMSI.

Lawler's next witness was Michael T. Willis. Although currently self-employed, he testified he had used the services of SMSI when he was a volunteer fireman and as a driver for Caddo Ambulance Company. He complained the pagers provided by SMSI for the fire department were hard to understand in metal buildings in some parts of Caddo parish. He also had trouble with false alarms. He admitted he had not been with the fire department in over four years. Also, he did not know whether the pagers were donated by SMSI or if the fire department used SMSI's transmitters.

As an ambulance driver he complained of problems with getting a clear channel on the two-way radio telephone provided by SMSI. He admitted it had been over a year since he had worked for Caddo Ambulance. Although he stated he did not have a financial interest in Caddo Ambulance, he admitted the company was owned by Lawler.

Mr. John Hughes, marketing director for Air Time Communications, a private paging service owned by Lawler not subject to Commission regulation, testified he had conducted a range test of SMSI's paging service. Although not an engineer or technician, he felt he had a general knowledge of the paging industry because of his previous employment with Motorola Communications in the 1960's. In order to test SMSI's paging range he went to SMSI and requested long distance paging. Since SMSI did not have a long distance pager on hand and one would not be available until the end of the week, he rented a local pager. He also requested an antenna, but since this would have to be ordered he used an antenna from his own stock. In order to test the paging system he used a mobile telephone obtained from another firm. According to his tests the pagers he provided through Air Time Communications outperformed the SMSI pager. Particularly, he found there was difficulty receiving the page in Vivian, north of Shreveport, and in Atlanta, Texas. He admitted that as a private carrier Air Time was able to use higher powered equipment than regulated carriers.

Mr. Hughes also stated he intended to test the capabilities of one of the other certificate holders in the Shreveport area, Radio & Communication Consultants, Inc., but he "blanked out" and could not remember if he ever performed the tests or what the results might have been.

Mr. Lawler then testified in his own behalf. He stated SMSI's tone-voice paging was weak in the Pine Island oilfield and in some towns north of Shreveport, such as Vivian and Plain Dealing. He based this opinion on complaints made to him by certain customers of SMSI but declined to name or produce those customers.

Lawler also stated he would provide certain alpha-numeric paging formats referred to as Pocsag and HSC. The Pocsag format was not currently provided by area carriers. With Pocsag a customer could enter a 352 character message using codes on a touch-tone telephone. As for HSC alpha-numeric paging, a format in which an operator types the message using the carrier's computer terminal instead of a touch-tone

telephone pad, Lawler felt the existing carriers charged too much. He also stated existing carriers did not provide voice storage or antennas for these pagers. He also testified he had trouble with pagers he rented from Radio & Communication Consultants in 1985, and once had a bad pager when he was a volunteer fireman.

THE OPPOSITION'S CASE

Several witnesses, called by a representative of SMSI, testified as to the adequacy of the existing service and the ability of the current certificate holders to meet the future needs of the public.

Leo Wiman, President of SMSI, testified there was no need for additional facilities in the Shreveport area. As to current service, he testified SMSI provided the highest technology equipment available and currently served the entirety of the Shreveport area. In preparation for the hearing, SMSI requested the Commission to forward copies of any complaints concerning service which had been received in the previous year. None had been received. With regard to long distance paging service, SMSI had recently installed simulcast transmitters, which under current F.C.C. licensing extended coverage to the Athens and Monroe areas.

In response to Lawler's complaints of lack of voice storage and alpha-numeric paging, Wiman testified SMSI previously provided voice storage but discontinued the service due to lack of demand. As for HSC paging, a customer could request an equivalent service but it is necessary to go through an operator to broadcast the message. Wiman also testified that SMSI recently purchased $150,000.00 in new equipment which, in addition to improving and adding other services, would provide both voice storage and alpha-numeric paging. SMSI also has the financial resources needed to meet the future needs of the public.

Mr. George T. Woodgate, Vice-president of SMSI, elaborated on the capabilities of the new equipment, the custom long distance paging SMSI provided, and responded to the specific complaints of Lawler's witnesses. He explained the new equipment would be installed in approximately one month. SMSI has also installed a microwave transmission line between Monroe and Shreveport which allows a customer to dial local numbers to access the service without a long distance charge. SMSI also has networking agreements which allows custom paging in the New Orleans, Baton Rouge and Lake Charles areas from Shreveport.

Woodgate also testified that SMSI has customers from Vivian and Oil City which they currently serve without complaint. SMSI's own field tests of the different paging systems show coverage in the areas Lawler claimed were weak. The only complaints they had were with bad individual pagers, not the range of service. He also explained SMSI was not responsible for the problems experienced by the volunteer fire department because SMSI only donated the pagers, the actual paging was done over a Sheriff's department transmitter not operated by SMSI.

Mr. Floyd D. Shipley, an independent consulting radio engineer, was offered as an expert in radio communications by SMSI. He was familiar with SMSI's equipment based on work he had performed for the firm since 1978. In preparation for the hearing he prepared a map showing SMSI's service coverage based upon FCC propogation standards. This map shows full coverage of not only the area of Lawler's application, but also the entirety of Sabine, Webster, Claiborne, Red River, Bienville, Jackson, Lincoln, Union and Ouachita parishes, with partial coverages of Natchitoches, Winn, Caldwell, Franklin, Richland, Morehouse and West Carroll parishes. Portions of Texas and Arkansas are also covered. Shipley did not make actual field tests since they were not required by the FCC.

Shipley also testified the field test performed by Mr. Hughes with an SMSI pager and Air Time antenna were probably faulty since using an antenna not designed specifically for the pager actually diminishes reception instead of improving it. Also, the areas claimed by Lawler not to be covered are serviced by SMSI's Blanchard tower,

not the Shreveport Tower. Since Hughes did not request a pager for those areas he was not given a pager serviced by the Blanchard tower.

Mr. Eddie Faith, owner of Radio & Communication Consultants, Inc., testified in behalf of SMSI. He stated he did not know the exact range of his pagers but that he covered Caddo and Bossier parishes. He had received no complaints from his customers, including those located in the areas Lawler claimed were weak. Faith offered alpha-numeric paging through an operator but did not offer touch-tone telephone input because it was too hard to use. He did not offer HSC paging at the time because the format was currently in litigation and his engineers questioned its reliability.

As to future expansion, Faith testified he had received additional frequencies from the FCC to simulcast in Bossier, Caddo and Webster parishes and that the necessary equipment had been ordered. He also obtained a one million dollar line of credit to finance future expansion. He was of the opinion that the existing carriers actively competed for business and provided adequate service to the public.

Finally, SMSI called Michael W. Brock, owner of an oil industry investment firm and SMSI customer. He had no financial interest in any of the parties involved. Brock testified he had previously used Lawler's mobile telephone service but because of the trouble and expense he experienced had switched to SMSI's paging service. His employees carry voice pagers and have never had trouble with receiving messages in the areas Lawler claimed were weak or in buildings, including Pine Island oilfield, Vivian, Oil City and Plain Dealing. He had no trouble obtaining repairs and felt SMSI provided an excellent system and service.

ANALYSIS

The Commission found Lawler's witnesses established existing carriers did not cover Bossier parish entirely and experienced trouble in metal buildings. The district court properly found this evidence to be insubstantial. The witnesses were biased and the complaints were dated. Many complaints simply did not pertain to paging services. To the extent this testimony carries any weight, SMSI has clearly refuted these claims.

The Commission also noted the range test conducted by Lawler showed service to the Pine Island oilfield and the southern tip of Caddo Parish to be inadequate. This test was properly disregarded by the district court. It is biased and obviously unprofessional and unscientific. The testimony of Shipley, the consulting engineer, and Brock, a customer using the system in those areas, negates clearly this finding of the Commission.

Assuming Lawler has shown the present service of the existing certificate holders to be inadequate, the record is devoid of evidence indicating these carriers are unable, refuse or have neglected to provide adequate service after a hearing on reasonable notice. To the contrary, the present carriers showed they are investing to expand the services provided.

Since the Commission could not have reasonably found from the evidence that Lawler sustained his burden of proof required by Section 1503(C) of Title 45, the district court properly reversed the order of the Commission issuing the certificate.

For the foregoing reasons the judgment of the district court is affirmed.

AFFIRMED.

STATE of Louisiana

v.

Teddy ROUSSELLE.

No. 87-K-2419.

Supreme Court of Louisiana.

March 11, 1988.

Reconsideration Denied April 7, 1988.

Prior report: 514 So.2d 577 (La.App. 4th Cir.1987).

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Writ of Certiorari
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v.

LOUISIANA PUBLIC SERVICE COMMISSION.

Nos. 90-CA-1723, 90-CA-1724.

Supreme Court of Louisiana.

Jan. 22, 1991.

Private paging service applied for certificate to enable company to operate paging service as radio common carrier. The Public Service Commission granted a certificate, and competing service and Association of Radio Common Carriers appealed. The District Court, 19th Judicial District, reversed, and paging service appealed. The Supreme Court, Calogero, C.J., held that: (1) finding that paging service failed to show that existing service was inadequate and that existing service had been unable, refused, or neglected to provide reasonable adequate service was supported by evidence, and (2) granting of certificate on grounds that consumers could be better served by more competition in radio common carrier industry was improper.

Affirmed.

1. Telecommunications ⇐461.10

When there is existing radio common carrier in service area, in order for Public Service Commission to grant competing certificate to new applicant, applicant must prove that existing service is inadequate, and that existing service is unable, refuses, or neglects, after hearing, to provide reasonable adequate service. LSA-R.S. 45:1503, subd. C.

2. Telecommunications ⇐461.10

Standard of review for orders of Public Service Commission concerning granting of radio common carrier certificate requires that courts accord great weight to Commission orders; orders must be overturned if arbitrary, capricious, and not reasonably based upon evidence presented.

3. Telecommunications ⇐461.10

Finding by district court that applicant for competing radio common carrier certificate to establish paging service failed to show that competing service was inadequate and that competing service was unable to, refused to, or neglected to provide reasonable adequate service after hearing was supported by evidence that most of proposed services suggested by applicant, such as voice prompts and repeat page, had been offered at one time by competing service but discontinued for lack of demand, and only evidence of public demand for supplemental features was general and conclusory allegations by applicant that customers of his private paging service appreciated enhanced services.

4. Telecommunications ⇐461.10

Public Service Commission improperly granted radio common carrier certificate to new applicant in service area in which radio common carrier already existed on grounds that consumers would be better served by more competition in radio common carrier industry; radio common carrier statute embodies legislature's policy decision to protect public interest by avoiding costs of unrestrained competition which would result in wasteful duplication of service, and Commission's policy-making decision must yield to that of legislature.

W. Glenn Burns, Margaret Silverstein, Monroe & Lemann, New Orleans, for Groom Enterprises, Inc. plaintiff-appellant.

Ashton R. Hardy, Regina Wedig, New Orleans, James L. Ellis, Baton Rouge, Robert Rieger, Carlos G. Spaht, Baton Rouge, for appellee.

CALOGERO, Chief Justice.

We must determine whether Groome Enterprises, Inc. (Groome) made a sufficient showing under the radio common carrier statute, LSA-R.S. 45:1503(C), to warrant

the grant of a certificate of public convenience and necessity by the Louisiana Public Service Commission (Commission). The applicant, John William Groome, sought a certificate to enable his company to operate a paging service as a radio common carrier in several parishes in which Radiofone is the existing common carrier. The Commission granted the certificate despite the Hearing Examiner's recommendations to deny after each of the two hearings on the matter.[1]

Appeals were taken by Radiofone and the Louisiana Association of Radio Common Carriers in the Nineteenth Judical District Court. The district court reversed the Commission's order, concluding that the evidence presented by Groome was not sufficient to meet the statutory requirements of the radio common carrier statute.

Groome appealed directly to this Court pursuant to Article IV, § 21(E) of the Louisiana Constitution of 1974. The Commission chose not to appeal the district court's reversal of their order. After a review of the record, we conclude that the district court acted properly in reversing the Commission's order.

Where there is an existing radio common carrier, entry of a competing carrier is governed by La.R.S. 45:1503(C):

> The commission shall not grant a certificate for a proposed radio common carrier operation or extension thereof which will be in competition with or duplication of any other radio common carrier unless it shall first determine [1] that the existing service is inadequate to meet the reasonable needs of the public *and* [2] that the person operating the same is unable to or refuses or neglects after hearing on reasonable notice to provide reasonable adequate service.

La.Rev.Stat.Ann. § 45:1503(C) (West 1982).

[1] Radiofone is the existing radio common carrier in Groome's proposed service areas of Orleans, Jefferson, St. Bernard, St. Charles, Plaquemine, Terrebonne and St. Tammany Parishes. Therefore, the Commission is authorized to grant a competing certificate to Groome only if Groome carries the burden of proving that 1) Radiofone's service is inadequate, and 2) that Radiofone is unable, refuses, or neglects, after hearing, to provide reasonable adequate service.

[2] The standard of review of Commission orders is well settled. Although Commission orders are generally accorded great weight, they must be overturned if arbitrary, capricious, and not reasonably based upon the evidence presented. See, e.g., *Southern Message Service v. Louisiana Pub. Serv. Comm'n*, 554 So.2d 47, 56 (La.1989) (*Southern Message IV*); *Southern Message Service v. Louisiana Pub. Serv. Comm'n*, 426 So.2d 606, 607 (La. 1983) (*Southern Message II*); *Communications Indus., Inc. v. Louisiana Pub. Serv. Comm'n*, 260 La. 1, 254 So.2d 613 (La.1971).

[3] The district court's finding, with which we are in agreement, was that the applicant's showing before the Commission failed in both respects. The evidence did not prove inadequate service, much less that Radiofone has been unable, refuses, or neglects to provide reasonable adequate service. The evidence is to the contrary.[2] The Commission's only finding relative to inadequacy of service had to do with Groome's offering additional customer convenience features not currently offered by Radiofone. The evidence, however, does not support the conclusion that this makes Radiofone's service inadequate. Mr. Harrel Freeman, Radiofone's employee and expert witness, testified that most of the proposed services suggested by Groome, such as voice prompts and repeat page, had

1. The applicant produced no evidence at the first hearing. The Commission on its own motion, and over the objection of Radiofone, granted Groome another hearing as an opportunity to supply information to meet the statutory requirements of LSA-R.S. 45:1503(C).

2. Radiofone produced seven public witnesses who each testified that their service with Radiofone is adequate and that they obtain quick response when problems arise. Radiofone's counsel also requested the Commission to take cognizance that no complaints had been filed concerning the existing service.

been offered at one time by Radiofone, but discontinued for lack of demand. The only evidence of public demand for the supplemental features was the general and conclusory allegations by the applicant himself that the customers of his private paging service appreciate the enhanced services. As we recently stated, "[g]eneral, conclusory, and self-serving statements are insufficient to prove that the public convenience and necessity requires additional service." *CTS Enterprises v. Louisiana Pub. Serv. Comm'n*, 540 So.2d 275, 280 (La.1989).

[4] The apparent reason for the granting of the certificate was a pro-competition agenda of the Commission majority which voted to grant the certificate. But as we have previously said:

> The commission may well be correct in its assertion that Louisiana's consumers would be better served by more competition in the radio common carrier industry.... In the face of clear legislative direction to the contrary, however, that decision is for neither the commission nor this court to make. If the industry is to be deregulated, then such deregulation must come from the legislature. Until this occurs, we and the commission are bound to enforce the statutes as written.

Southern Message IV, 554 So.2d at 55.

La.R.S. 45:1503(C) embodies the Legislature's policy decision to protect the public interest by avoiding the costs of unrestrained competition which would result in wasteful duplication of services. See *Southern Message IV*, 554 So.2d at 55. The Commission's policy-making decision here must yield to that of the Legislature.

Decree

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

Glenn GAUTHIER

v.

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION, LTD., et al.

No. 90-C-1115.

Supreme Court of Louisiana.

Jan. 22, 1991.

Worker's compensation claimant filed suit against carrier and employer for additional benefits in lieu of earlier lump-sum settlement entered into with carrier. The Twelfth Judicial District Court, Parish of Avoyelles, H.J. Brouillette, J., awarded additional benefits to claimant, but declined to impose penalty on carrier for illegal lump-sum settlement on ground that parties had been in good faith in negotiating compromise. Defendants appealed. The Court of Appeal, 561 So.2d 137, affirmed. Claimant applied for writs, seeking enforcement of penalty provision. The Supreme Court, Marcus, J., held that: (1) penalty is mandatory when lump-sum settlement is made in contravention of statute, and (2) there is no good-faith exception to mandatory provision imposing penalty for illegal lump-sum settlement.

Affirmed in part; reversed in part and remanded.

Lemmon, J., concurred and assigned reasons.

1. Workers' Compensation ⇐1042

When a lump-sum settlement of a worker's compensation claim is made in contravention of statute, penalty of one and one-half times compensation which would have been due but for lump-sum settlement, is mandatory. LSA-R.S. 23:1274.

2. Workers' Compensation ⇐1012, 1014

Section of Worker's Compensation Act requiring that lump-sum settlements be approved by Director or by court, and that payments due pursuant to settlement shall

CERTIFICATE OF SERVICE

I, Thomas G. Henning, hereby certify that on this 19th day of September 19, 1994, I caused to be mailed postage-prepaid, by U.S. first class mail, a copy of the foregoing "Comments of Mercury Cellular Telephone Company and MobileTel, Inc. " to the following:

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